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Chairman: Mr. Politi ..... (Italy)

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The meeting was called to order at 10.35 a.m.

Agenda item 160: Nationality of natural persons in relation to the succession of States (*continued*) (A/C.6/55/L.16)

1. **Mr. Vázquez** (Ecuador) recalled that, in its resolution 54/112, the General Assembly had decided to consider at its fifty-fifth session the draft articles on the nationality of natural persons in relation to the succession of States prepared by the International Law Commission with a view to their adoption as a declaration and had invited Governments to submit comments and observations on the possibility of elaborating a convention on the issue. During informal consultations, some delegations had suggested that a declaration should be adopted; others had stated that they would prefer not to take such a definitive step at the present time; yet others had proposed that a convention should be elaborated. He then presented draft resolution A/C.6/55/L.16, entitled "Nationality of natural persons in relation to the succession of States", and hoped that it could be adopted by consensus.

2. **Ms. Blokar** (Slovenia), speaking in explanation of position, said that her delegation was in favour of adopting the draft resolution, but recalled that the States of Central and Eastern Europe had had an extensive body of practice on the matter, which differed from what was proposed in the draft articles. Therefore, it was her delegation's understanding that the resolution would serve as a guideline and would not oblige States that had resolved the issue differently to enact new laws or modify existing ones.

3. *Draft resolution A/C.6/55/L.16 was adopted.*

Agenda item 157: Convention on jurisdictional immunities of States and their property (*continued*) (A/C.6/55/L.12, A/C.6/55/L.19

4. **The Chairman** announced that Bulgaria had become a sponsor of draft resolution A/C.6/55/L.19.

5. **Ms. Gnecco** (Colombia), speaking on behalf of the Rio Group, underlined the practical importance of the issue of the jurisdictional immunities of States and their property, owing to the increase in international trade relations, with the consequent increase in the case law emerging from national courts and international codification on the matter. The inter-American system, to which the Rio Group member countries belonged, recognized the possibility of the State acting or contracting as a private person and considered the courts competent to hear cases on that issue, under the Code of Private International Law.

6. Over time, the traditional idea that the State had absolute immunity had given way to the concept of restrictive immunity, accepted by the domestic legislation and jurisprudence of the States and embodied in various international instruments. As would be recalled, the concept was based on the distinction between acts jure imperii and jure gestionis, a criterion that, although easy to distinguish in theory, had proved difficult to apply in practice, particularly with regard to the nature or the purpose of the act. Thus, the States had considered it necessary to codify the issue of the jurisdictional immunities of States and their property on a global level. The Rio Group felt that it was very important to determine and clarify those criteria in the draft resolution that was adopted.

7. Considerable time had elapsed since the General Assembly, in its resolution 32/151, had invited the International Law Commission to examine the issue of immunity and even since the Commission had adopted the final text of the draft articles and forwarded them to the General Assembly with the recommendation that it should convene a conference of plenipotentiaries to consider the draft as a convention, an idea that the Rio Group had supported from the outset. However, it had still not been possible to obtain a text that was acceptable to all, because there were aspects that needed to be examined and developed more thoroughly. However, negotiations had progressed significantly and the result that everyone hoped for was growing nearer.

8. The Rio Group had always been in favour of a convention on the issue and therefore insisted on the need to adopt an instrument of that nature in order to establish norms that prevented the disputes that were occurring, owing either to a lack or a proliferation of domestic legislation. Hence, the Rio Group strongly supported the proposal submitted to the Working Group of the Sixth Committee by the Danish delegation that the topic should be examined by a more specific body and supported the establishment of an ad hoc committee to resolve outstanding substantive issues and determine the need to hold a conference. Lastly, the Rio Group requested that the ad hoc committee's sessions should be adequate and timely and undertook to cooperate with the process.

9. **Ms. Cueto** (Cuba) said that the proposal to negotiate and adopt a convention on jurisdictional immunities of States and their property was both interesting and necessary. She reiterated her delegation's support for General Assembly resolution 53/98, in which the General Assembly had decided to establish at its fifty-fourth session an open-ended working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property adopted by the International Law Commission. Her delegation had participated with interest in the discussions on that topic and considered that the revised text was satisfactory, although it should have included certain general principles.

10. The issue of jurisdictional immunities of States and their property was constantly evolving and was influenced by developments in the legislation and practice of States. Clearly, States were increasingly acting within the framework of jure gestionis and outside the traditional bounds of jure imperii, although it was true that the trend had not yet become a general norm. Her delegation therefore endorsed the views of various delegations which had stated that the draft articles of a convention on the topic should reaffirm the general principle that every State enjoyed jurisdictional immunity in the courts of another State in respect of itself and its property except in the cases and terms specifically provided for in the future convention. It must also be recognized that the obligation to respect jurisdictional immunity was international in nature and that a State before whose courts a proceeding had been initiated against another State or in which measures of coercion had been ordered against another State or measures of constraint taken against its property had the obligation to ensure respect in the proceeding for the latter State's jurisdictional immunity, thereby helping to reaffirm the general principle that jurisdictional immunity was a State's right unless it had expressly consented to waive it.

11. Her Government considered it necessary to promote a balance between State sovereignty and the interests that arose when an individual concluded a transaction with a State. One way of achieving that goal would be to stress the distinction between acts that were sovereign, public or governmental in character and acts that were commercial or private in character. The issue of measures of constraint taken against a State's property deserved particular attention owing to its complexity and its influence on relations between States. Her delegation had taken note of the views expressed by numerous delegations regarding the proposed alternatives to the draft articles and endorsed the general principle that measures of constraint taken against the property of a State could be ordered only through a proceeding and would imply subjecting that State to the said proceeding. The principle of the prohibition of execution should be reaffirmed, taking care to allow for the possibility of establishing exceptions.

12. Recent international events demonstrated the need to strengthen the validity of the general principles of international law applicable to the issue of jurisdictional immunities of States and their property, such as the principle that a State before whose courts a proceeding of any kind had been initiated against another State or in which, in a separate proceeding, measures of coercion had been ordered against another State or measures of constraint taken against its property had the obligation to guarantee that such proceedings were conducted with respect for the jurisdictional immunity of the foreign State and to promote an amicable settlement of the dispute that had given rise to the said proceeding. It was disturbing that international relations were currently governed by coercive measures and procedures incompatible with the most elementary principles of international law, including a State's decision to authorize recovery of punitive damages against a foreign State with respect to the latter State's property located in its territory.

13. Her delegation was in favour of elaborating and adopting an international convention on jurisdictional immunities of States and their property and welcomed the proposal to establish an ad hoc committee to deal with that matter. It was also in favour of holding an international conference on the topic and hoped that the International Law Commission and the Sixth Committee would promote the adoption of a convention which, instead of enshrining a principle of absolute or restrictive immunity, would reflect the areas on which there was international agreement and establish as specifically as possible what was meant by jurisdictional immunity and what the exceptions to it might be.

14. **Mr. Guan** Jian (People's Republic of China) said that the establishment of a universally applicable system of immunity of States and their property was a complicated issue in international law. The draft

articles proposed by the International Law Commission in 1991 could serve as a basis for the elaboration of a legal instrument, since they took into account the theories, legislation and judicial practice of various countries.

15. Thus far, three main problems remained unsolved: the criteria for determining whether a contract or transaction was commercial; the relationship between a State and a State enterprise; and measures of constraint against State property. With respect to the first question, his delegation considered that in determining whether a transaction was commercial, it was necessary first to determine the nature of the transaction and, as a complementary criterion, its purpose. The goal was not to expand the scope of immunity enjoyed by States, but rather to avoid or resolve any legal conflict that might arise as a consequence of the difference between legal systems. The draft articles proposed by the International Law Commission in 1991 provided a means of resolving that conflict from the perspective of international law. It would therefore be advisable to adopt the solution proposed in that draft, which would not affect the jurisdiction of a State over the commercial acts of other States.

16. With regard to the relationship between States and State enterprises in the context of the system of immunity, China was of the view that such enterprises were not unique to certain countries. In addition, the asset composition of such enterprises took various forms. In China, for example, assets of State enterprises included the assets of natural persons and other juridical persons not belonging to the State. Under Chinese law, State enterprises had independent ownership of and the right to dispose of their own assets; they were thus independent of each other and of the State. Paragraph 3 of article 10 of the Commission's draft objectively reflected that independent relationship between the State and State enterprises, without creating any additional privileges for either, and should therefore be retained.

17. With regard to the question of measures of constraint against State property, China felt that such measures were clearly different from those against ordinary property and could, therefore, be imposed only with the consent of the State whose property was the subject of such measures. Furthermore, if the property was situated in the territory of the forum State and was specifically in use or intended for use by the State for other than governmental non-commercial purposes, measures should be confined to property that had a connection with the claim that was the object of the proceeding or with the State agency or other instrumentality against which the proceeding was directed. His delegation favoured giving a State a grace period of two to three months to implement a ruling. In its view the system of immunity of States and their property was an important issue that involved State sovereignty and relations among States, and a convention would be the only feasible instrument for ensuring compliance with the rules to be established.

18. **Mr. Kulyk** (Ukraine) stressed the importance of the jurisdictional immunities of States, not only for the further development of the relevant doctrine of international law, but also for its direct and practical influence on State activities in various spheres, particularly in international trade, as well as for the concern that States might exploit the doctrine of sovereign immunity to escape liability in commercial transactions.

19. International trade and political relations between States could be damaged if the regime governing jurisdictional immunities became a patchwork of different national laws, unpredictable and perhaps unable, individually or cumulatively, to protect adequately the interests of State and non-State participants. Increased predictability in the operation of the jurisdictional immunity doctrine was indispensable, and his delegation therefore strongly favoured the elaboration of an international convention on the subject, a task that was both feasible and realistic. There was enough evidence of custom and practice to make such codification possible, even necessary, given the many conflicting unilateral solutions. There existed, of course, and would always exist, differences among States regarding the basic concepts of the doctrine of sovereign immunity and specific aspects of its implementation. However, those differences were not as broad as they might seem, and ten years after the adoption of the draft articles by the International Law Commission even those States that had once insisted on absolute immunity had recognized the need for a restrictive view. The Working Group of the Sixth Committee had come very close to a generally agreed solution on some of the outstanding substantive issues, in particular, those concerning the concept of a State for the purpose of immunity, the concept of a State

enterprise in relation to commercial transactions and contracts of employment.

20. There should be no further delay in elaborating a universal regime for jurisdictional immunities. Even though the specific content and application of the doctrine of jurisdictional immunities had generally been left for the courts of individual States and their domestic legislation, it was also true that, by definition, jurisdictional immunities involved more than one State, and their purpose, first of all, was to strike a balance between respect for national sovereignty and the liability of a State for not fulfilling its commercial obligations. A uniform regime of jurisdictional immunities would promote consistency in international commercial transactions, provide States and private parties with some legal certainty on a range of issues, and generally encourage international trade.

21. In the view of his delegation, the concept of a model law proposed at the previous session of the General Assembly, despite certain advantages, lacked sufficient legal weight and would lead to the presumption that the international community was unable or unwilling at the present stage to undertake effective codification of international law on the subject. Ukraine would therefore be ready to consider the possibility of accepting a model law only as an interim measure, but not as a substitute for a convention.

22. In conclusion, he reiterated his delegation's strong commitment to the search for balanced and, if necessary, compromise solutions with a view to advancing the elaboration of a generally acceptable international legal instrument. It supported the draft resolution proposed by the representative of Germany, which represented a pragmatic and flexible approach to future work on jurisdictional immunities.

23. **Ms. Burnett** (United Kingdom) said that the report of the Working Group of the Sixth Committee showed that important progress had been made but that serious differences still remained. With regard to the definition of a State for purposes of immunity (item 1), she welcomed the clarification suggested by the Chairman of the Working Group in section V of his report (A/C.6/55/L.12). It was important that the entities referred to should not only "be entitled to" exercise governmental authority but also be actually acting in that capacity. Concerning the criteria for determining the commercial character of a contract or transaction (item 2), the number of alternative texts had been usefully narrowed, although the report still reflected a wide spectrum of views. There was also a range of views concerning the concept of a State enterprise (item 3) and the treatment of contracts of employment (item 4), which reflected differences in State practice.

24. The question of measures of constraint against State property (item 5) remained a matter of fundamental concern. No instrument on that subject would be acceptable to her delegation if it did not provide a proper basis for the enforcement of judgements in cases where it had been established that there was no immunity. The Chairman's suggested alternative I, without the words in the square brackets, provided the basis for an acceptable solution.

25. Her delegation shared the view expressed by a significant number of delegations that an appropriate way to arrive at a successful and constructive conclusion would be to draft general guidelines or principles on the topic, or perhaps a model law. It was her understanding that the aim of the ad hoc committee in 2002 would be to work towards an instrument whose form and content would be acceptable to all and, on that basis, her delegation was prepared to support the establishment of such a committee.

26. **Mr. Štefánek** (Slovakia) said that his delegation considered the issue of jurisdictional immunities of States and their property to be a practical one. State entities and their representatives, in particular diplomatic and consular missions, often faced situations in which they must invoke jurisdictional immunities. The absence of generally binding norms and standards at the international level created considerable legal uncertainty, and there was a clear need for harmonization of national laws, which differed substantially from State to State. As a result, State positions with regard to immunity covered a wide spectrum, ranging from doctrines of absolute immunity to very restrictive interpretations.

27. The issue of the final form of a future instrument relating to jurisdictional immunities had been discussed thoroughly. His delegation still stressed the need to adopt a legally binding instrument, in other words, an international convention, but at the same it urged that more attention should be directed towards the substance of the exercise. Considerable progress had been made within the framework of the Working Group

of the Sixth Committee, and agreement was within reach on three of the five outstanding issues, namely, the concept of a State for purposes of immunity, the concept of a State enterprise or other entity in relation to commercial transactions and contracts of employment; what remained was only a matter of drafting. The deadlock in previous negotiations had largely been attributable to the issue of the definition of a commercial contract or transaction, in particular the criteria for determining its commercial character. His delegation therefore welcomed the suggestion made by the International Law Commission to delete reference to any specific criteria and leave that question to the discretion of the courts. That approach enjoyed considerable support from many delegations. However, his delegation remained flexible and ready to work further with delegations who favoured retaining the relevant provision as it appeared in the draft articles.

28. The issue of measures of constraint against State property seemed to pose the greatest difficulty, although there were some promising developments in the third informal paper by the Chairman of the Working Group (A/C.6/55/WGJIS/WP.3), particularly with regard to alternative II therein.

29. His delegation joined in sponsoring draft resolution A/C.6/55/L.19, which he hoped would be adopted by consensus. It strongly believed that the ad hoc committee to be established would provide a suitable forum for the successful completion of the work on the topic of jurisdictional immunities of States and their property.

30. **Mr. Alabrune** (France) said that in November 1997 his delegation had submitted written comments on the issue of jurisdictional immunities of States and their property and had made its position clear in the Working Group meetings from 6 to10 November 2000. At that time it had explained the main elements of its position with regard to the draft articles proposed by the International Law Commission and had stated its preference for an international convention as the appropriate instrument. Only a convention, based in law, and uniform and unambiguous, could provide an appropriate solution to the difficulties which international law specialists faced on a daily basis.

31. With regard to substance, important progress had been made on the outstanding issues, for example, the concept of a State for purposes of immunity, the criteria for determining the commercial character of a contract or a transaction, the concept of a State enterprise, contracts of employment and measures of constraint against State property. The remaining difficulties revolved around the criteria for determining the commercial character of a contract or transaction and measures of constraint, but he was confident that acceptable solutions would be found in both cases. His delegation welcomed the establishment of an ad hoc committee on jurisdictional immunities of States and their property, which would meet in March 2002; that new initiative should lead to the elaboration of a generally acceptable instrument that would foster codification of State practice, which was currently highly diverse.

32. **Ms. Telalian** (Greece) commended the Chairman of the Working Group of the Sixth Committee on jurisdictional immunities for his efforts, which had enabled significant progress to be made, although differences still existed, particularly with regard to the criteria for determining the commercial character of a contract or transaction and measures of constraint. Her delegation was convinced that it would be possible to overcome such difficulties and find compromise solutions.

33. The draft resolution which provided for the establishment of an ad hoc committee paved the way for such a compromise. Indeed, as the German delegation had indicated, the ad hoc committee would have competence not only to examine the outstanding issues but also to resolve them, improve the draft articles and decide whether they should be submitted to the consideration of a diplomatic conference. Greece believed that it was urgent to elaborate a uniform legal regime that would reflect State practice in the sphere of State responsibility and ensure the necessary predictability in commercial transactions between States. Currently, the principle of restrictive immunity was widely recognized by most States as the prevailing rule of international law.

34. **Mr. Maréchal** (Belgium) said that it was important that the rules on jurisdictional immunities of States should be harmonized at the international level, and he was therefore pleased to observe that real progress had been made in the Working Group's discussions. Belgium favoured the establishment of the ad hoc committee mentioned in paragraph 3 of draft resolution A/C.6/55/L.19, which would allow the momentum observed in the negotiations that had taken place in the Working Group to be continued and

strengthened, and bring divergent positions closer together.

35. **Mr. Witschell** (Germany), at the request of the Chairman and before a decision was taken on draft resolution A/C.6/55/L.19, briefly recalled the oral revisions introduced during the previous meeting (A/C.6/55/SR.30).

36. **Ms. Carol** (Canada) said that Canada would join the consensus, but the title of the draft resolution should not affect the status of the work of the ad hoc committee that was to meet in March 2002, which would have the widest possible latitude to conclude the negotiations.

37. **Mr. Mikulka** (Secretary of the Committee), referring to the financial implications of draft resolution A/C.6/55/L.19, said that the ad hoc committee mentioned in paragraph 3 would meet for two weeks in March 2002. It would hold two meetings a day, one in the morning and one in the afternoon, with interpretation in the six official languages. The volume of documentation needed was expected to be 30 pages before the session, 60 pages during the session and 30 pages after the session, and it would be produced in the six official languages. It was calculated that, in 2002, a total amount of $282,500 would be required for conference services. If the draft resolution was approved, those needs would be considered when the programme budget for the biennium 2002-2003 was being prepared.

38. **The Chairman** said that, if he heard no objections, he would take it that the Sixth Committee wished to adopt the draft resolution without a vote.

39. *Draft resolution A/C.6/55/L.19 was adopted.*

40. **The Chairman** said that the Committee had concluded its consideration of agenda item 157.

Agenda item 165: Review of the Statute of the United Nations Administrative Tribunal (*continued*)
(A/C.6/55/L.18)

41. **Ms. Burnett** (United Kingdom), also speaking on behalf of France and Ireland, introduced draft resolution A/C.6/55/L.18 and said that it proposed amendments to the Statute of the United Nations Administrative Tribunal with regard to the qualifications of its members, the duration of their mandate, the consideration of cases that raised a significant question of law, and a few matters of detail. The complete text of the Statute with the amendments proposed appeared in the annex. The text prepared reflected what had been said in both formal debates and informal consultations. She wished to draw attention to the fifth preambular paragraph, which reflected the interest expressed by several delegations that, in appointing members of the Tribunal, the principal legal systems of the world and fair geographical representation should be taken into account. It had also been decided to eliminate the paragraph that had provided that the item should be included in the provisional agenda of the fifty-seventh session of the General Assembly. She thought that, in general, the draft was acceptable to all the delegations and hoped that it could be adopted by consensus.

42. **Mr. Peralta** (Mexico) said that, in the Spanish version of the fifth preambular paragraph, the word "ordenamientos" should be replaced by "sistemas".

43. **The Chairman** said that, if he heard no objections, he would take it that the Sixth Committee wished to adopt the draft resolution without a vote.

44. *Draft resolution A/C.6/55/L.18 was adopted.*

45. **The Chairman** said that the Committee had concluded its consideration of agenda item 165.

The meeting rose at 11.55 a.m.